

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF WISCONSIN

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In re

TRACEY RENE TURCK,

Debtor.

Case No. 03-34679

Chapter 7

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MEMORANDUM DECISION ON TRUSTEE'S MOTION  
FOR TURNOVER OF PROPERTY OF THE ESTATE

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The debtor filed a chapter 7 petition on September 29, 2003. After the trustee filed a no asset report on November 20, 2003, the debtor received a discharge on January 21, 2004, and the case was closed. On March 12, 2004, after being advised by debtor's counsel that the debtor was to receive previously undisclosed state and federal tax refunds, the trustee filed a motion to reopen the case, as well as a motion for turnover of property of the estate. The case was reopened, the trustee's no asset report was withdrawn, and the parties filed briefs regarding what portion, if any, of those refunds was property of the estate.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (E) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a) and 157(b)(1). The following constitutes the court's findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

UNDISPUTED FACTS

The debtor filed individual tax returns for 2003, as head of household. Pursuant to her filed federal returns, she had federal income tax withheld of \$2,330, earned income credit of \$2,689 and

child tax credit of \$1,000. The debtor was entitled to a substantial earned income credit because she has four dependent children. With the change in the tax law in 2003, she received a \$400 early credit in August 2003 prior to filing bankruptcy. This money was received and spent prior to the filing of her petition. Although the debtor had a federal income tax obligation of \$433, that was wiped out by the child tax credit. In total, the debtor received a \$5,586 federal income tax refund.

The debtor had a state income tax of \$286, which was offset by Wisconsin income tax withheld of \$1,105 and a Wisconsin earned income tax credit of \$1,156. She received a state tax refund of \$1,975.

## ARGUMENTS

The trustee asserts that the subject tax refunds are estate property and should be turned over for the benefit of creditors. The estate is entitled to received the pro-rated share of the tax refunds up to the date of the bankruptcy filing. Since the debtor filed on the 272<sup>nd</sup> day of the year, the trustee argues he is entitled to received 272/363 of the tax refunds, or \$5,634.50. According to the trustee, case law does not limit turnover based on the various tax attributes that make up the elements of a tax refund. Many tax elements are earned during the year, but the fact that the taxpayer receives full credit for these attributes at the end of the year does not alter the estate's pro rata portion. Furthermore, courts have not distinguished between earned income credits, child care credits or other tax attributes when determining that tax refunds are property of the estate.

The debtor contends her situation is distinguishable from the usual cases finding tax refunds are estate property because a substantial portion of her tax refund was generated by the earned income credit and the child tax credit. Of her \$7,561 total tax refund, \$3,435 was generated from income tax

withheld during the year and the balance from the earned income credit and child care tax credit.

Those credits were based on the debtor's income and children in her home at the end of the tax year, December 31, 2003. Because the debtor was not entitled to any earned income credit or child care credit on the date of her petition, September 29, 2003, the refunds attributable to those credits are not property of the estate. According to the debtor's analysis, the trustee is only entitled to the difference between the income tax withheld, \$3,435, and an exemption of \$2,942,<sup>1</sup> or \$493.

## DISCUSSION

Under 11 U.S.C. § 541(a), property of the estate includes all the debtor's legal or equitable interest in property at the time of the filing of the petition wherever located and by whomever held. In turn, § 521 of the Bankruptcy Code provides the debtor shall "surrender to the trustee all property of the estate." 11 U.S.C. § 521(4).

### *Tax Refund(s) Attributable to Income Tax Overpayment*

The debtors have not disputed that income tax refunds are property of the bankruptcy estate. See *Kokoszka v. Belford*, 417 U.S. 642, 652 (1974). Therefore, the portion of the refunds attributable to federal and state income tax overpayments is property of the estate.

### *Tax Refund Attributable to Earned Income Credit*

The earned income credit (EIC) is available to low income workers through federal legislation, and is codified in the Internal Revenue Code at 26 U.S.C. § 32. Eligibility for the EIC is not contingent

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<sup>1</sup>Although the debtor has not yet amended her schedules to claim a portion of the refunds exempt, she asserts the trustee would not oppose an exemption of \$2,942.41 under 11 U.S.C. § 522(d).

upon owing income tax; nevertheless, the EIC is calculated as a percentage of the recipient's earned income, and is defined and refunded as a tax "overpayment." 26 U.S.C. § 6402; *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 863 (1986).

The overwhelming authority concludes that an earned income tax credit is property of the estate. See, e.g., *In re Garrett*, 225 B.R. 301 (Bankr. W.D.N.Y. 1998); *In re Brockhouse*, 220 B.R. 623 (Bankr. C.D. Ill. 1998); *In re Beagle*, 200 B.R. 595 (Bankr. N.D. Ohio 1996); *In re Buchanan*, 139 B.R. 721 (Bankr. D. Idaho 1992); *Matter of Davis*, 136 B.R. 203 (Bankr. S.D. Iowa 1991).

The court rejects the debtor's argument that the EIC is not estate property because it was not earned until the end of the year in which the petition was filed. In *In re Johnston*, 209 F.3d 611 (6<sup>th</sup> Cir. 2000), the Sixth Circuit held that the earned income tax credit available to the debtor at the end of the tax year in which she filed her chapter 7 petition was included in the debtor's "property of the estate" even though the debtor's bankruptcy petition was filed prior to the end of the tax year in which the credit was earned. See also *In re Montgomery*, 224 F.3d 1193 (10<sup>th</sup> Cir. 2000) (holding debtors' EICs for a tax year, as prorated to dates of petition filings, were estate property regardless of whether petitions were filed prior to end of the tax year, even though debtors' interests in EICs were not finalized until end of the tax year; EICs are to be treated as tax refunds, and such contingent interests are to be included in the bankruptcy estate).

Consequently, the portion of the debtor's refunds attributable to the earned income credit is property of the estate.

*Tax Refund Attributable to Child Care Tax Credit*

The current version of the child care tax credit (CCC) provides that a certain percentage of expenses paid for any form of child care for a child under the age of thirteen living with the taxpayer will be credited to a taxpayer's tax bill. Specifically, Internal Revenue Code § 21(a)(2) limits the percentage of expenses to between 20% and 35%, decreasing with an increase in the taxpayer's adjusted gross income. 26 U.S.C. § 21(a)(2). This inverse relationship between the percentage and the taxpayer's income aims to benefit lower income families. Only expenses spent on child care which “enable the taxpayer to be gainfully employed” are eligible. 26 U.S.C. § 21(b)(2)(A).

There is scant case law specifically pertaining to whether payments made to a debtor for CCCs are property of the estate. Without analyzing the specific nature of CCCs, the bankruptcy court in *In re Garrett*, 225 B.R. 301 (Bankr. W.D.N.Y. 1998), found that tax refunds that derived by reason of such credits were property of the estate. The court rejected the debtor’s argument that such payments were distinguishable from income tax refunds. *Id.* at 302-03.

Because this court finds no reason to distinguish child care tax credits from income tax refunds attributable to withheld taxes or EICs, the portion of the debtor’s refunds attributable to those credits is property of the estate.

#### *Pro-Rated Refunds as Property of Estate*

The majority of the courts, having found credits for earned income or child care expenses to be property of the estate, also determined that the credits were subject to turnover, as pro-rated to the date on which the bankruptcy petitions were filed. *See, e.g., In re Whitmer*, 228 B.R. 841 (Bankr. W.D. Va. 1998). Since the debtor filed on the 272<sup>nd</sup> day of the year, the trustee is entitled to 272/365 of the tax refunds, or \$5,634.50.

*Tax Refunds as Exempt Property*

This court need not reach the issue of whether there is an exemption for the EIC, the CCC or the income tax refunds because the debtor has not formally claimed an exemption in the refunds. Should the debtor claim such an exemption, the court will only determine the issue upon an objection by the trustee.

CONCLUSION

Based on the foregoing analysis, the trustee's motion for turnover of property of the estate is granted.

Dated at Milwaukee, Wisconsin, July 13, 2004.

BY THE COURT

/s/ Honorable Margaret Dee McGarity  
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
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ORDER GRANTING TRUSTEE'S MOTION  
FOR TURNOVER OF PROPERTY OF THE ESTATE

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For the reasons stated in the court's memorandum decision entered on this date,  
IT IS ORDERED the trustee's motion for turnover of property of the estate is granted.

Dated at Milwaukee, Wisconsin, July 13, 2004.

BY THE COURT

/s/ Honorable Margaret Dee McGarity  
Chief United States Bankruptcy Judge